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July 20, 2001

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VIA COURIER

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-B204
Washington, D.C. 20554

Re: *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's April 27, 2001 Further Notice of Proposed Rulemaking are an original, and four paper copies, of the Reply Comments of Focal Communications Corporation and US LEC Corp.

Please date stamp and return the enclosed extra copy of this filing in the self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,

Harisha J. Bastiampillai

Enclosures

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Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

REPLY COMMENTS OF FOCAL COMMUNICATIONS CORPORATION AND US LEC CORP.

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July 20, 2001

SUMMARY

The Commission has given the interexchange carriers ("IXCs") a further opportunity to demonstrate that there is justification to require a separate rate for CLEC 8YY access charges lower than the benchmark rate the Commission recently established for CLEC access charges in general. The IXCs have failed to make this demonstration, and there is no reason for the Commission to deviate from its original position of applying the benchmark it set to 8YY traffic.

AT&T and Sprint have submitted data in the hope of convincing this Commission that there is a pervasive problem in regard to CLEC 8YY access charges and practices. The data, however, provides no such showing, and, in fact, demonstrates that for many CLECs their percentages of 8YY traffic are in line with ILEC percentages. For those CLECs that have higher percentages, there is a more simple explanation for such a phenomenon than the IXC premise that contractual arrangements between CLECs and high-volume customers are driving up 8YY traffic volume. The higher 8YY traffic percentages for some CLECs simply reflect the reality that CLECs at this stage of their market roll-out serve a higher percentage of medium and large sized businesses. These businesses generate a high volume of 8YY calls regardless of whether their local exchange provider is a CLEC or an ILEC. ILECs also continue to dominate the residential market which drives down their relative percentage of 8YY traffic.

The IXCs attempt to impugn this focus on high-volume customers, but this market entry strategy simply follows the strategy of initial competitors in the long distance market, and is an approach this Commission has suggested to be prudent. Likewise, the use of revenue sharing arrangements is one rooted in the history of the telecommunications industry, and has been extensively used by the same IXCs who now malign the practice. The IXCs have failed to demonstrate that the rates or practices of CLECs in regard to 8YY access service are in any way

unreasonable. In this regard, the comments of a coalition of universities is particularly telling. The coalition noted that such revenue sharing arrangements do not drive up the volume of 8YY traffic on their campuses, but rather provide invaluable ways of reducing their costs, and meeting their needs in regard to providing toll-free access service to their students. The same principles would apply to other high-volume users such as hotels or hospitals.

The IXCs have also failed to demonstrate any cost basis to justify a lower rate for CLEC 8YY access service. AT&T suggests that the use of dedicated facilities lowers the cost of 8YY access service for CLECs, but it has not established how prevalent such a practice is, and, in fact, invokes only the example of one CLEC whose originating access traffic is virtually all 8YY traffic. The initial round of comments demonstrated that many CLECs do not use such facilities so it would be inappropriate to lower the benchmark rate across-the-board for 8YY traffic. Even for those CLECs that use dedicated facilities, AT&T has failed to establish why they should be required to charge a lower rate. AT&T's proposal would impose all the costs of such facilities on the CLEC end user, and exempt the cost drivers of 8YY access service over such facilities, *i.e.*, the recipients of the toll-free calls. AT&T also seeks to preclude CLEC recovery of tandem switching and transport costs despite the fact that CLEC switches provide such functionality. AT&T does not provide adequate cost support for its proposal, and its proposal would eliminate the administrative simplicity that the Commission's current benchmark mechanism provides.

The IXCs have failed to show that there is a problem with CLEC 8YY access charges. Any potential for regulatory arbitrage has been eliminated by the Commission's application of the benchmark mechanism. If IXCs are still concerned over the charges or practices of a CLEC they can utilize the Section 208 complaint process, a process that they are not shy in using. There is no reason for the Commission to take further action on this issue.

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In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

REPLY COMMENTS OF FOCAL COMMUNICATIONS CORPORATION AND US LEC CORP.

Focal Communications Corporation ("Focal") and US LEC Corp. ("US LEC") ("Commenters") submit these reply comments in response to the Commission's Further Notice of Proposed Rulemaking concerning access charges for 8YY toll-free traffic originated by competitive local exchange carriers ("CLECs").[1]

I. THE IXCS HAVE FAILED TO DEMONSTRATE THAT CLEC 8YY ACCESS TRAFFIC IS PROBLEMATIC

As discussed below, none of the evidence submitted in the initial round of Comments by interexchange carriers ("IXCs") is reliable or sufficient to warrant a finding that CLEC 8YY access traffic or practices are problematic. In its Comments, AT&T attempts to demonstrate that the "problem" goes beyond the charges of a few carriers by using a convoluted process to try to determine the amount of access charges that resulted from the provision of 8YY service.[2] AT&T calculates $57 million for 8YY access charge traffic for 2000, which AT&T claims represents 30% of the CLEC access charges billed to AT&T. Similarly, Sprint conducted a sample of its

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[1] *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (April 27, 2001) ("*CLEC Access Charge Order*").

[2] CC Docket No. 96-262, Comments of AT&T Corp. at 6 (June 20, 2001)("*AT&T Comments*").

April 2001 access billing records from "a representative number of CLECs" and reports that 8YY traffic amounted to 54% of interstate access minutes that CLECs exchanged with Sprint for the month.[3] In contrast, Sprint claims that only "27% of the access traffic that Sprint exchanged with various ILECs during April 2001 were 8YY access minutes."[4]

The IXC figures demonstrate many things, but one thing this data does not demonstrate is that there is anything unusual about 8YY access traffic. On the one hand, the Sprint and AT&T data demonstrate how difficult it is to define and segregate 8YY traffic much less base a benchmark on such a definition. The significantly different percentages found by AT&T and Sprint, and the loose methodology used by both Sprint and AT&T, suggest that contrary to AT&T's assertions, defining the amount of 8YY traffic is not a simple task.[5] AT&T's figures also suggest that its percentage of CLEC 8YY traffic (30%) is only slightly higher than the percentage of ILEC 8YY traffic (27%) Sprint reported.

Sprint, of course, claims it found a higher percentage of CLEC 8YY traffic, but bases that figure on a "representative sample" of 18 CLECs. Sprint does not claim that there was any method to this sampling, and Commenters believe it is highly doubtful that there was any. This means that the traffic patterns of a significant number of CLECs could have been excluded from this analysis. As the Comments in this proceeding have demonstrated, it is impossible to generalize as to the 8YY access traffic of CLECs or ILECs. For instance, Z-Tel Communications, Inc. ("Z-Tel") stated in its Comments that it serves primarily residential customers, does not aggregate 8YY traffic and does not engage in revenue sharing agreements.[6] Sprint's data shows Z-Tel's percentage of 8YY access traffic to be in line with the percentages of

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3 CC Docket No. 96-262, Comments of Sprint Corporation at 5 (June 20, 2001) ("*Sprint Comments*").
4 *Id.*
5 *See, AT&T Comments* at 12.
6 CC Docket No. 96-262, Comments of Z-Tel Communications at 2 (June 20, 2001) ("*Z-Tel Comments*").

the ILECs.[7] In fact, of the 18 CLECs Sprint "sampled", 9 had 8YY percentages within 10% of the ILEC percentage. Likewise many rural CLECs do not have high percentages of 8YY traffic.[8] It appears that no traffic of rural CLECs was included within Sprint's "representative sample." In the *CLEC Access Charge Order*, the Commission noted that it found the survey of CLEC access charges submitted by ALTS to be "questionable" in part because ALTS did not explain how it selected 32 CLECs in their sample from among the approximately 200 CLEC members ALTS has.[9] Sprint's sample of CLECs is even smaller, and does not provide any insight into the methodology it used to define the sample and calculate its figures. Thus, Sprint's data does not provide the basis for any accurate insight into the nature of 8YY access charges. At a minimum, the Commission must treat this data consistent with the same standard of review it gave the ALTS data.

Even if Sprint's figures are taken as representative, they do not demonstrate anything other than the fact that some CLECs may have a higher percentage of 8YY access traffic than ILECs. This is not surprising given the relative nature of their customer bases. CLECs, at this stage of their market rollout, generally have a significant amount of high-volume business customers.[10] Some of these business customers will generate a significant amount of 8YY traffic.[11] The CLEC focus on high volume customers is not surprising, and the Commission suggested that such a market entry approach would be prudent. As the Commission noted:

> An incumbent can forestall the entry of potential competitors by "locking up" large customers by offering them volume and term discounts at or below cost. Specifically, large customers may create the inducement for potential

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7 *See Sprint Comments* at 5, n. 5.

8 *See*, CC Docket No. 96-262, Comments of the Rural Independent Competitive Alliance at 2 (June 20, 2001) ("*RICA Comments*"); CC Docket No. 96-262, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (June 20, 2001) ("*OPASTCO Comments*").

9 *CLEC Access Charge Order*, ¶ 47, n. 108.

10 This is consistent with ILEC market development early in the 20th century.

11 *See*, CC Docket No. 96-262, Comments of Minnesota CLEC Consortium at 2 (June 20, 2001) ("*Minnesota CLEC Comments*") (observing that "toll-free 8YY calling is an important service for many business customers.")

> competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers. To the extent the incumbent can lock in the larger business customers whose traffic would economically justify the construction of new facilities, the incumbent can foreclose competition for the smaller customers as well.[12]

That some of these customers will naturally have a high percentage of 8YY traffic will drive up the relative CLEC percentages for such traffic.

Another factor that will account for any difference between CLEC and ILEC percentages in 8YY traffic is the continued dominance by the ILECs of the residential market. The latest FCC report on telephone competition showed that nearly 60% of CLEC local telephone lines served medium and large businesses, institutional and government customers, while only 20% of ILEC lines served medium and large business customers.[13] Meanwhile CLECs only serve 4.6% of residential and small business customers.[14] Since residential and small business customers generate far fewer 8YY calls than medium to large sized businesses, companies serving medium to large businesses – CLECs or ILECs -- would have a higher percentage of such traffic. The customers that CLECs are purportedly targeting, such as hotels and universities, are customers that would generate a high volume of 8YY traffic regardless of the carrier. If the IXCs conducted a survey of ILEC business customer traffic, it might well produce percentages of 8YY traffic comparable to what they attribute to CLECs.

IXCs are attempting to impute some wrongdoing on the part of CLECs who serve high volume customers. When MCI began competing with AT&T, MCI focused on high volume

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[12] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition for U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, and CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, at ¶ 79 (August 27, 1999)("*Pricing Flexibility Order*")

[13] *Federal Communications Commission Releases Latest Data on Local Telephone Competition*, FCC News Release at 2 (May 21, 2001).

business customers to recover the cost of its investments and facilities.[15] Similarly, as volumes increase, CLECs can expand their networks and enter new markets, both residential and business.

Another fundamental point that the IXCs have failed to prove is the existence of any correlation between CLEC contractual arrangements with high volume businesses and increased 8YY calling volume. In fact, this premise has been explicitly rejected by the Association of Telecommunications Professionals in Higher Education ("ACUTA"), a national non-profit association representing colleges and universities and the telecommunications professionals who operate university telecommunications services.[16] ACUTA notes that "the volume of calling on university campuses will not be influenced in any way whatsoever by any contractual arrangement with a CLEC to carry traffic."[17] Students, ACUTA notes, generate 8YY calls for a number of reasons including use of pre-paid calling cards, wanting to use a different toll provider than the campus long distance provider, using their parents' calling cards or making collect or third-party billed calls to their parents' number.[18] For instance, in one university, only 50% of the students use the university's designated long distance provider. Thus, on any given day, the other 50% are using toll-free access to use another provider.[19] These students are not influenced by, and are probably not cognizant, of any incentive arrangement the university may have in place with the CLEC.

The IXCs have been given an ample opportunity to prove their case about the "problem" with 8YY access charges and have not done so. The IXCs have attempted to build a case on

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14 *Id.*

15 *See,* Michael Kellogg, *et al., Federal Telecommunications Law* at 29 (2d ed. 1999).

16 CC Docket No. 96-262, Comments of the Association of Telecommunications Professionals in Higher Education (June 20, 2001) ("*ACUTA Comments*").

17 *Id.* at 2.

18 *Id.*

numbers, but these numbers do not establish the existence of any problem, and merely demonstrate why the Commission should take no further action on the issue.

II. NO COST BASIS HAS BEEN DEMONSTRATED TO JUSTIFY A LOWER RATE FOR 8YY ACCESS CHARGES

Keen on upsetting the administrative simplicity of the benchmark rate system developed by the Commission in regard to CLEC access charges, AT&T asks that the Commission require CLECs to charge the ILEC rate immediately for 8YY access charges and that CLECs who use dedicated facilities for 8YY traffic charge only the ILEC local switching rate.[20] Predictably, AT&T offers no cost support for either proposition, and as we shall demonstrate below there is no cost basis for either proposition.

A. There Is No Basis For An Across-the-Board Lower Rate For 8YY Access Charges

The only semblance of cost support that AT&T proffers for a lower rate for CLEC 8YY access charges is its claim that CLECs are purportedly using high-capacity dedicated access facilities for outbound 8YY traffic. The only evidence it offers for this CLEC "practice" is the practice of US TelePacific Corp. US TelePacific is hardly a typical CLEC in regard to types of service provided. U.S. TelePacific is primarily focused on providing service to hotels in the California and Las Vegas regions.[21] As a result of this marketing focus, over 99.97% of TelePacific's originating traffic is 8YY traffic. U.S. TelePacific uses dedicated, special access facilities to service these customers.[22] The practice of one CLEC does not provide a basis to determine rates for all other CLECs, particularly when that CLEC's service is focused exclusively on one discrete market segment.

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[19] All IXCs will benefit from this as the lucrative long distance traffic of these students is not tied up with one provider.

[20] *AT&T Comments* at 3.

[21] *AT&T Comments* at 4.

Yet, AT&T is attempting to build a case for a lower rate on the practices of this one CLEC. AT&T has not established how prevalent the use of dedicated, special access facilities is in providing 8YY access service. Furthermore, the Comments of Z-Tel and the rural CLECs suggest that many CLECs do not use such facilities.[23] Some CLECs may use dedicated facilities more extensively. In fact, AT&T itself utilizes dedicated special access facilities to provide 8YY and other services to customers both through its long distance arm as well as its local subsidiaries (the former TCG and ACC companies).[24] AT&T, however, would subject all CLECs to a lower rate for 8YY traffic regardless of the extent to which those CLECs use dedicated facilities, if they use such facilities at all. As RICA noted in its Comments, this Commission has eschewed establishing rates on the basis of cost analysis of individual carriers in favor of a market based approach.[25] The Commission should exercise similar restraint here. There is no basis to apply a lower 8YY access rate to all CLECs based on the practice of an individual CLEC.

B. Even If A CLEC Uses Dedicated Facilities To Service The Traffic Of A Customer, There Is No Basis For A Lower Rate For 8YY Access Traffic Of These CLECs

AT&T has also failed to establish that even if the use of dedicated facilities to provide 8YY access service is prevalent amongst CLECs it results in a lower cost to the CLEC in providing 8YY access service sufficient to justify a lower benchmark rate. In fact, it would be quite disingenuous for AT&T to make such a claim based on statements it has made in other

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22 *Id.*

23 *See Z-Tel Comments* at 2; *Minnesota CLEC Consortium Comments* at 2; *RICA Comments* at 2.

24 *See, In the Matters of AT&T Communications Transmittal Nos. 434 and 435*, CC Docket No. 85-326, Memorandum Opinion and Order on Reconsideration, FCC 86-511, 1 FCC Rcd. 930 (1985) (regarding AT&T provision of special access service for long distance customers); CC Docket No. 96-98, *Ex Parte Presentation of BellSouth*, Attachment 3 at p. 1 (Feb. 21, 2001) (citing AT&T's testimony that AT&T "has the ability to connect virtually any qualifying local exchange customer in Tennessee to one of [its] switches through AT&T dedicated access services.")

25 *RICA Comments* at 3, *citing, In the Matters of AT&T Corp. v. Business Telecom, Inc.; Sprint Communications Company v. Business Telecom, Inc.*, Memorandum Opinion and Order, EB-01-MD-001; EB-01-MD-002; FCC 01-185 (May 30, 2001).

proceedings. A CLEC has three options in regard to provisioning dedicated, high capacity facilities to a particular customer. A CLEC may either deploy the facility itself, lease facilities from a competitive access provider, such as AT&T, or lease the facility from the ILEC. As AT&T noted in its Comments on the RBOC Petition regarding High Capacity Loops and Transport, the first two options are not viable options for CLECs. AT&T observed that the CLEC share of the special access market has grown marginally, if at all, and that competitive access is not a viable alternative.[26] In fact, AT&T concluded that there is not sufficient evidence to support a finding that alternative high capacity facilities are generally available outside the incumbent LEC's network.[27] AT&T has also argued for the unbundling of ILEC high capacity facilities to provide exchange access service noting that "competitive carriers would be impaired in their ability to provide such services if they were denied access to incumbent loop and transport facilities."[28]

AT&T argues that to use these high capacity facilities, CLECs will generally have to rely on leasing these facilities from the ILEC. Given the restriction on the use of unbundled loop/transport combinations ("EELs") to provide access service, CLECs purchase these facilities from ILEC special access tariffs. These special access facilities are not required to be TELRIC-priced and are often priced at rates much higher than the unbundled DS1/DS3 rates.[29] AT&T has noted how restrictions on the use of EELs force CLECs to make the Hobson's choice of

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[26] CC Docket No. 96-98, Opposition of AT&T Corp. to Joint Petition at 7-8 (June 11, 2001) ("*AT&T High Capacity Facility Comments*"); CC Docket No. 96-98, Reply Comments of AT&T Corp. On Use of Unbundled Network Elements To Provide Exchange Access at iv (April 30, 2001) ("*AT&T EEL Comments*") (noting that competitive "long haul fiber is not a substitute for the incumbent LEC local facilities that competing carriers must use to provide local and special access services.")

[27] *AT&T High Capacity Facility Comments* at 8.

[28] *AT&T EEL Comments* at iii. Commenters, by no means, condone the use restrictions, and, in fact, suggest that the lifting of such restrictions, and granting CLECs unbundled access to high-capacity facilities at TELRIC prices to provide exchange access service, would help reduce the cost of access service for all concerned.

[29] *UNE Remand Order* at ¶ 341, n. 673 (noting significant price differentials ranging from 50% to 353% between retail special access service and unbundled transport).

"investing in unnecessary facilities or reselling the incumbent LEC's overpriced special access service."[30] It is, therefore, unclear, based on AT&T's prior pronouncements, how it can argue that CLEC provisioning of 8YY access service through use of dedicated, high capacity facilities leads to a significantly lower cost for providing such service.

AT&T also argues that CLECs can recover the cost of these high-capacity facilities from their end users. However, CLECs should not recover the cost of providing originating 8YY access service from its customers. ACUTA notes that it must add trunking facilities to handle 8YY calls.[31] The costs incurred for use of such facilities for 8YY access service are attributable to the recipients of the toll free calls and access charges for such calls are rightly imposed on the interexchange carriers that service those recipients. The Commission has stated that one of its primary goals in regard to access charges is to better align rate structure with the manner in which costs are incurred.[32] The costs for trunks dedicated to 8YY access service are attributable to the recipients of the toll-free calls and costs should be assessed in reflection of this fact. In effect, AT&T asks the Commission to impose bill-and-keep for access for 8YY traffic before it has evaluated issues raised in the Intercarrier Compensation NPRM.[33]

AT&T proposes that "in establishing a benchmark for CLEC access services provided to business customers for outbound 8YY traffic carried over dedicated local access facilities, the appropriate benchmark is the ILEC's local end office switching charge for originating switched access services."[34] AT&T bases this proposition on a comparison of the functions performed by a CLEC in providing switched access service to the functions provided by the ILEC. AT&T

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30 *AT&T EEL Comments* at 39.
31 *ACUTA Comments* at 3.
32 *CALLS Order* at ¶ 18.
33 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (April 27, 2001)
34 *AT&T Comments* at 10.

contends that for two of the functions in 8YY switched access service, CLECs do not provide the same functionality that the ILEC does.

First, AT&T argues that in regard to the use of dedicated facilities, CLECs already recover these costs from the high-volume customer. As explained above, CLECs do not recover the costs of providing 8YY access service over these facilities from the high volume customer. These costs are, and need to be, recovered from the access service customer. This traffic will represent the "cost driver" of these facilities and their costs are, and should be, recovered from the access service customer.

Second, AT&T argues that the ILECs largely provide tandem switching functionality in regard to CLEC switched access service, and these tandem access costs are billed separately to the IXC by the ILEC. AT&T suggests that since "the connection between the local switch and the IXC's point of presence is provided in large part by the ILEC which operates the tandem switch," CLECs should not recover charges for this functionality of switched access service.[35] However, CLEC switches provide tandem switching functionality and CLECs should be entitled to recover these costs. The Commission correctly recognized this in allowing the safe harbor benchmark rate to include "tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching."[36] AT&T itself has argued before state public utility commissions that its local switches, such as its 5ESS switches, provide tandem switching functionality.[37]

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35 *AT&T Comments* at 10.

36 *CLEC Access Charge Order* at ¶ 55, n. 128.

37 CC Docket No. 96-98, *Ex Parte Presentation of BellSouth*, Attachment 3 at p. 1 (Feb. 21, 2001) (citing AT&T's testimony in December 2000 before the Tennessee Regulatory Authority in Docket No. 00-00079 that AT&T's local switches "perform both both end-office and tandem switch functions.")

III. REVENUE SHARING ARRANGEMENTS ARE REASONABLE AND LAWFUL

Both AT&T and Sprint ask the Commission to declare CLEC revenue sharing arrangements in regard to 8YY access charges unreasonable and unlawful, but offer no basis for such a finding. The Commenters noted in their Comments that use of revenue sharing arrangements is a long-standing practice in the industry and has been allowed by the Commission.[38] The Commission has sanctioned provision of commissions to hotels based on the volume of 0+ traffic they generate.[39] Likewise, the Commission has condoned commission payments to private payphone companies.[40] IXCs, such as AT&T, have been at the forefront of the use of such arrangements.[41]

These commissions also do not constitute unlawful rebates because hotels and universities are not the customers of the CLEC's 8YY access service; therefore, the commissions do not constitute unlawful rebates of tariffed charges. The party being charged the tariffed rate is the interexchange carrier serving the recipient of the toll-free call, and the IXC is being charged the tariffed rate. The commissions are not based on any tariffed service purchased by the hotels and universities.[42]

Far from being unreasonable or unlawful, the revenue sharing arrangements serve legitimate and positive ends. ACUTA noted that these arrangements: 1) are completely

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38 *Focal/US LEC Commenters* at 6-8.

39 CC Docket No. 96-262, Comments of the Association of Communications Enterprises at 4 (June 20, 2001) ("*ASCENT Comments*"); CC Docket No. 96-262, Comments of Time Warner Telecom at 3 (June 20, 2001) ("*Time Warner Comments*").

40 *ASCENT Comments* at 4.

41 CC Docket No. 96-262, Comments of Focal Communications Corporation and US LEC Corp. at 7 (June 20, 2001) ("*Focal/US LEC Comments*")

42 *ASCENT Comments* at 4, *citing*, *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd. 7135, ¶ 8 (1992).

unrelated to the volume of toll-free calls made on their campuses, and 2) help offset the substantial costs the universities incur in regard to providing toll-free access on their campuses.[43]

The high volume of 8YY access traffic is not due to any inappropriate dealings between high-volume businesses and CLECs, but rather arise out of the normal course of business and market forces. The Comments of ACUTA echo Focal/US LEC's argument in their initial Comments that the volume of toll-free calling is not dependent on the contractual arrangements between CLECs and high-volume business users.[44] The end user in both the hotel and university context for 8YY calls is not the hotel nor the university, but the guest or the student.[45] The guest or student has no incentive to generate a high amount of 8YY calls, particularly given the generally high per minute rates on such calls, and the existence of surcharges.[46] Plus the increasing market penetration of wireless phones, and free or reduced rate long distance plans that often accompany such phones, could lead the guest or student to use a wireless phone to make calls as opposed to dialing a toll-free number and an access code.[47] The same lack of motivation for students to overuse 8YY services exists for hospital patients and hotel guests.

These arrangements also do not distort competition as alleged by AT&T. AT&T argues that such arrangements give CLECs a competitive advantage vis-à-vis ILECs and IXCs. Both ILECs and IXCs are capable of offering similar types of arrangements to these high-volume customers. IXCs also have the opportunities to compete for these high volume customers through their local service affiliates. Most of the IXCs provide local service as well so there is no restriction on their ability to compete for these customers. In fact, as Sprint notes, ACC, AT&T's subsidiary, uses such revenue sharing arrangements. In fact, 85% of the traffic ACC

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43 *ACUTA Comments* at 1-3.

44 *Focal/US LEC Comments* at 4; *see also, Time Warner Comments* at 3.

45 *Time Warner Comments* at 4.

46 *See,* CC Docket No. 96-262, Petition for Reconsideration of Time Warner Telecom at 9 (June 20, 2001).

exchanged with Sprint was 8YY traffic.[48] Thus, revenue sharing arrangements do not give CLECs a competitive advantage.

IV. THE BENCHMARK RATE STRUCTURE ADDRESSES IXC CONCERNS

AT&T argues that the commissions are funded by "a rate for originating switched access service that substantially exceeds the switched access rate charged by the ILEC competing in the same local market."[49] Disregarding the merits of such a claim, the benchmark mechanism applied by the Commission has eliminated this "issue" by establishing rates for CLEC switched access service that the Commission has deemed just and reasonable.

The IXCs argue that CLEC rates will still be higher for the transition period and this continues to create opportunities for arbitrage. This is simply a rehash of the failed argument that the IXCs made in urging that the Commission require CLECs to charge the ILEC rate for all switched access services immediately. The Commission has already considered and addressed this argument in the context of switched access charges in general, and there is no evidence which would lead the Commission to deviate from the approach in this context.[50] In the *CLEC Access Charge Order*, the Commission declined to flash cut to the ILEC rate to avoid "too great a dislocation in the CLEC segment of the industry."[51] For the same reasons, there should be no flash cut to the ILEC rate for 8YY access service.[52] Further, the benchmark rates do not provide CLECs any significant possibility for regulatory arbitrage. The benchmark rates are already sufficiently close to the ILEC rates and will rapidly decrease in the next few years.

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47 *Id.*
48 *Sprint Comments* at 7.
49 *AT&T Comments* at 4.
50 *CLEC Access Charge Order* at ¶¶ 61-62.
51 *Id.*
52 *See Focal/US LEC Comments* at 10-11.

V. THE COMPLAINT PROCESS IS MORE THAN ADEQUATE TO ADDRESS THE ISSUE OF 8YY ACCESS CHARGES

Numerous parties have echoed the Commenters' argument that the Section 208 complaint process is more than adequate to address any issues that may arise in regard to 8YY access charges.[53] In fact, the comments elicited in this proceeding have demonstrated how difficult it is to make across-the-board generalizations about 8YY access traffic. A fact-specific complaint proceeding would be better suited for resolving disputes in regard to 8YY access traffic, particularly since the IXCs have failed to demonstrate that there is a pervasive problem in regard to such traffic that necessitates Commission exercise of its rulemaking power.

Ironically, AT&T suggests it is prejudiced by the delays in resolving complaints, and claims a need to "limit the continuing injury." But it is the CLECs that have been injured by IXC refusals to pay duly tariffed charges and by the costs of litigation. Even with the new *CLEC Access Charge Order*, it is not clear when, or if, IXCs will meet their payment obligations.[54]

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[53] *Focal/US LEC Comments* at 4-5; *ASCENT Comments* at 5; *Time Warner Comments* at 6; *OPASTCO Comments* at 3; *ALTS Comments* at 3; *RICA Comments* at 4; *Minnesota CLEC Consortium Comments* at 3.

[54] Mary Greczyn, *Powell Meets With CLEC Heads On Competition Enforcement*, Communications Daily, Volume 21, No. 133 at 3 (July 11, 2001)(Noting that despite clear language of CLEC Access Charge Order, many CLECs are still waiting to recover both past and present access charges from IXCs).

VI. CONCLUSION

For the foregoing reasons, as well as those articulated in their initial Comments, the Commenters urge that the Commission reject the IXC requests that a separate benchmark rate be established for 8YY access charges.

Respectfully submitted,

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Dated: July 20, 2001

CERTIFICATE OF SERVICE

I, Harisha J. Bastiampillai do hereby certify that on this 20th day of July, 2001 the foregoing Reply Comments of Focal Communications Corporation and US LEC Corp. was delivered by hand and first class mail to the following:

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